EXHIBIT 6

IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

PATRICK DAUGHERTY,	:	
	:	
Plaintiff,	:	
	:	
v	:	C. A. No.
	:	2017-0488-MTZ
HIGHLAND CAPITAL MANAGEMENT, L.P., HIGHLAND EMPLOYEE RETENTION ASSETS LLC, HIGHLAND ERA MANAGEMENT LLC, and JAMES DONDERO,	:	
	:	
Defendants,	:	
	:	
and	:	
	:	
HIGHLAND EMPLOYEE RETENTION ASSETS LLC,	:	
	:	
Nominal Defendant.	:	

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Chancery Courtroom No. 12D
Leonard L. Williams Justice Center
500 North King Street
Wilmington, Delaware
Friday, May 17, 2019
1:30 p.m.

- - -

BEFORE: HON. MORGAN T. ZURN, Vice Chancellor

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RULINGS OF THE COURT ON PLAINTIFF'S MOTION TO COMPEL AND MOTIONS FOR COMMISSIONS
ORAL ARGUMENT AND RULINGS OF THE COURT ON PLAINTIFF'S MOTION FOR STATUS QUO ORDER AND DEFENDANTS' MOTION TO DISMISS COUNT IX OF SECOND AMENDED VERIFIED COMPLAINT

CHANCERY COURT REPORTERS
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APPEARANCES:

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McCollom D'Emilio Smith Uebler LLC
for Plaintiff

JOHN L. REED, ESQ.
DLA Piper LLP (US)
-and-
MARC D. KATZ, ESQ.
of the Texas Bar
DLA Piper LLP (US)
for Defendants

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THE COURT: Good afternoon. Please be seated.

First I wanted to acknowledge, we have an honored guest with us today. We have the Honorable Essam Yahyaoui, who is a judge from Tunisia. He presides over the commercial chamber of Tunisia's First Instance Court. So he's here to observe with his colleagues.

Welcome, sir.

All right. I'm going to start with the motion to compel, and then we'll move on to the motion for commission. And then there may be questions, and maybe take a break and regroup and we can move on with the other motions.

I'm going to grant Daugherty's motion to compel in part. For simplicity, I'm going to refer to Abrams & Bayliss as A&B. And I see four categories of documents at issue here. The first is regarding the initiation, negotiation, and establishment of A&B as Highland's escrow agent. The second is regarding A&B's legal work during the pendency of the Texas action to determine whether and how Daugherty might access the escrowed assets. The third is A&B's work responding to the Texas subpoena. And the fourth is

documents regarding A&B's resignation as Highland's escrow agent.

I grant the motion to compel as to Categories 1, 2, and 4 for one of two reasons.

The first reason is unfortunately my *in camera* review confirmed Daugherty's fear that Highland is improperly withholding documents in Categories 1 and 4 illustrating A&B's service and resignation as escrow agent, which are nonprivileged materials.

In a hearing on September 18, 2018, concerning an earlier subpoena, Vice Chancellor Glasscock stated that "... information regarding the actions of Abrams & Bayliss in connection with its operation of the escrow as agents of Highland, HERA, those documents, that information is relevant, and it doesn't appear to me to be generally privileged." That's a quote from the transcript.

Highland has been adamant that it was only withholding documents that implicated its role as legal counsel, and not in its role as escrow agent. For example, on page 28 of the transcript from the April 12th argument, Highland's counsel stated that, "We do not assert any privilege based solely on Abrams

& Bayliss's roles as escrow agents. It's purely because they have the dual roles both as escrow agents and also legal counsel, that when they were in the capacity of legal counsel, those communications were privileged."

At that argument, I requested the documents and stated I would review them *in camera*. I expressed my frustration that I had already given Highland multiple chances, and invited it to redo its privilege log for a final time.

In reviewing the documents, I concluded that more than 70 documents that were withheld based on claims of privilege or work product protection were improperly withheld. Those documents were Privilege Log No. 1 through 25, 27 through 29, 35, 36, 41, 54, 56, 62, 85 through 87, and 336 through 372.

This represents nearly 20 percent of the 372 documents in the log. But even that doesn't tell the full story, because more than 200 of the listed documents were simply attachments to e-mails collecting documents in response to the Texas subpoena. Excluding those, more than 50 percent of the documents listed were improperly withheld as

privileged.

Documents regarding A&B's nonlegal work and resignation as escrow agent are not privileged or work product because when A&B agreed to be an escrow agent, it stepped into a nonlegal role despite its status as a law firm.

The cases are clear on that point. *Northeast Credit Union v. CUMIS*: "It is well understood ... that the services of an escrow agent, even when that escrow agent is an attorney, are not legal services." *CCS Associates v. Altman*: "[C]ourts have specifically held that an attorney in the role of escrow agent does not transform communications pertaining to the administration of the escrow account into privileged documents." The first case is from the District of New Hampshire, and the second one is from the Eastern District of Pennsylvania.

These non-Delaware decisions more specifically enunciate a principle common in our own law. Including an attorney, or having an attorney perform nonlegal work, does not attach the privilege to the communications or the work. That is because "... the attorney-client privilege protects legal advice only, [and] not business or personal advice."

That's a quote from *MPEG v. Dell* from this court in 2013.

And as Vice Chancellor Laster said in the *Facebook Class C Reclassification* litigation, "Making the lawyer the point person creates a pretext for invoking the attorney-client privilege, but it is only a pretext." That's from his December 12th, 2016 order in Case No. 12286-VCL.

Categories 1 and 4 reflect communications between A&B and Highland concerning the start of the escrow relationship, or A&B resigning as escrow agent. To be sure, there were legal ramifications and issues regarding the work A&B was doing in setting up and then ending the escrow relationship. But any legal component of A&B's escrow-related work was secondary to the role as escrow agent. A&B was a contractual counterparty with Highland under the escrow agreement, and each had obligations under that agreement.

A&B did perform legal work on the escrow issue. For example, A&B attorneys analyzed what document 351 on the log calls the "HERA Strategy." But that legal advice was not for the benefit of Highland, who was A&B's contractual

counterparty. A&B could potentially claim that its attorneys were providing legal services to A&B as escrow agent. But that is not what is before me; A&B has claimed no privilege. The only issue is whether Highland can claim a privilege and withhold the communications containing A&B's legal analysis regarding its service as escrow agent.

I think an example here might be helpful. If Highland had retained a bank or other repository to act as escrow agent rather than a law firm, the result would be more clear. If the employees of that non-law firm escrow agent communicated internally about the relationship or the contract, it would not be privileged.

If those employees received legal advice from attorneys about how to structure the escrow, what the terms of the escrow agreement meant, or how it could fulfill Highland's request to unwind the escrow and transfer the assets back, Highland could not claim that the in-house or outside counsel retained by the escrow agent was providing legal advice for Highland's benefit. It would be much clearer that the attorneys were providing legal advice to, and for the benefit of, the escrow agent, not its

contractual counterparty, Highland.

The facts here are more muddied because there are only lawyers involved because Highland selected a law firm, that otherwise represented Highland, to act as escrow agent. But the result should be the same. A&B's privilege over its in-house advice regarding its conduct under the escrow agreement does not belong to Highland just because A&B is itself Highland's attorney.

The next question is one of remedy for improperly withholding so many of the documents as privileged. Waiver "... has been characterized as a 'harsh result' typically only justified 'in cases of the most egregious conduct by the party claiming the privilege.'" That's from *TCV v. TradingScreen*.

"If a party falls substantially short of the well-established requirements, then waiver is an appropriate consequence that helps dissuade parties from engaging in dilatory tactics." That's from *Mechel Bluestone v. James C. Justice Companies.*

Daugherty has been dogged in his pursuit of these documents, and Highland was just as resolute in refusing to produce them. Vice Chancellor Glasscock said last September these types of documents

are not privileged. I gave Highland multiple opportunities to address this. Because Highland stuck by its position and continued to assert such a large percentage of improper privilege assertions while claiming it was producing documents concerning A&B's role as escrow agent, any privilege related to that topic is waived, and a full waiver of Highland's privilege could be an appropriate consequence.

But I am reluctant to go that far because Categories 2 and 3 were properly withheld and logged adequately. Category 2 relates to a memorandum A&B prepared analyzing avenues available for Daugherty to pursue the escrowed assets. This work started in February 2014. Category 3 relates to efforts to collect documents in response to the subpoena for the Texas case. I conclude Highland's unjustified withholding of other documents related to the escrow was not so egregious as to waive any privilege over these two sets of documents.

This brings me to the crime-fraud exception. If Categories 1 and 4 were privileged, I would conclude that the crime-fraud exception applies and so A&B should produce those documents regardless. I reach the same conclusion for Category 2, the subset

of documents related to A&B's 2014 memorandum that were privileged and properly logged.

Rule of Evidence 502(d)(1) says that "There is no privilege ... If the services of the lawyer were sought or obtained to enable or aid anyone to commit or plan to commit what the client knew or reasonably should have known to be a crime or fraud."

To fall within this exception, "... a mere allegation of fraud is not sufficient; there must be a prima facie showing that a reasonable basis exists to believe a fraud has been perpetrated or attempted." That's from *Princeton Insurance Company v. Vergano*. That case also explains that "... when a client seeks out an attorney for the purpose of obtaining advice that will aid the client in carrying out a crime or a fraudulent scheme, the client has abused the attorney-client relationship and stripped that relationship of its confidential status."

The client must intend the communications to be used as a bases for the fraud. "The advice must advance, or the client must intend the advice to advance the client's ... fraudulent purpose." That's from *Buttonwood Tree Partners v. R.L. Polk*.

As Chief Justice Strine wrote while Vice Chancellor in *Princeton Insurance v. Vergano*, "The quintessential circumstance [when this exception applies] is when the client obtains the advice of the lawyer in order to help shape a future course of criminal or fraudulent activity. This is the classic situation when the privilege gives way, as the societal purpose of the confidential relationship has been entirely subverted, with the client seeking the expertise of someone learned in the law not so as to comply with the law or mitigate legitimately the consequences of his prior behavior, but to craft a course of future unlawful behavior in the most insidiously effective manner."

Here, there is a reasonable basis to believe a fraud has been perpetrated. Daugherty's claim for fraudulent conveyance survived a motion to dismiss, and I will refer the parties to Vice Chancellor Glasscock's January 16, 2018 opinion on that point.

The question is whether Highland sought the services of attorneys to enable or aid it in furtherance of that fraud. I believe there is a reasonable basis to believe that as well. Highland's

attorney at Andrews Kurth contacted A&B almost immediately after the Texas judgment became final and nonappealable. That's at Exhibit K.

Highland claims A&B then provided it legal advice interpreting the escrow agreement, and A&B resigned as escrow agent intending to cause, and in fact causing, the assets to return to Highland/HERA. That is the transfer that Daugherty claims was fraudulent.

This was not the first legal work A&B performed in pursuit of keeping the escrowed assets from Daugherty. Starting in February 2014, it analyzed Daugherty's ability to get at the assets while the appeal was pending. Because that appears to be the beginning of the efforts that culminated in the allegedly fraudulent acts, the crime-fraud exception strips the privilege from these documents.

Daugherty has made a *prima facie* showing that a reasonable basis exists to believe that a fraud has been perpetrated, and that Highland sought A&B to serve as escrow agent and to provide legal analysis in furtherance of that fraud; specifically, to protect the escrowed assets from Daugherty while the Texas case was pending, and then to transfer them

back to Highland after the Texas verdict was finalized. I conclude any privilege Highland claims over A&B's legal advice regarding the escrow arrangement and A&B's resignation has been stripped under the crime-fraud exception.

I want to be clear on what I am not saying. I am not saying that a fraud claim merely surviving a motion to dismiss permits the supposed victim to invade the defendant's privilege for any legal advice the defendant received in regards to the underlying transaction or act. This is a unique case in which it presently appears that the law firm that provided the legal advice, one, was a contractual counterparty to the defendant in the very contract under which the fraudulent transfer was allegedly made; two, provided legal advice interpreting that agreement and charting the course for the transfer; and, three, implemented its own advice to effectuate the transfer.

On these allegations, which are supported by the documents I have reviewed, it appears the defendant sought the firm's legal advice to further the alleged fraud based on the terms of the contract to which the defendant and the firm were

parties. Based on these uncommon facts, the crime-fraud exception applies here.

Accordingly, the privilege is either nonexistent or waived as I just described for Categories 1, 2, 4; in other words, all documents regarding A&B's service as escrow agent. The crime-fraud exception also applies to documents in these categories designated as work product, under *Playtex v. Columbia* out of the Superior Court.

I find that Category 3, regarding the Texas subpoena, was properly logged as privileged, and that the crime-fraud exception does not reach those documents. Daugherty has not alleged that the subpoena response was in furtherance of the fraud. Category 3 comprises the families associated with lines 91 through 327, which are the parent e-mails attaching documents collected in response to a subpoena.

Mr. Katz, is any of that unclear?

MR. KATZ: No, Your Honor. It's clear.

THE COURT: Mr. Uebler, any questions?

MR. UEBLER: No questions, Your Honor. Thank you.

THE COURT: Thank you.

We'll turn to the motion for commissions.

Daugherty seeks commissions to take the depositions of James C. Bookhout and Marc D. Katz, both of DLA Piper. I will refer to Mr. Bookhout and Mr. Katz collectively as "the requested deponents." Both requested deponents represented Highland in its dispute with Daugherty in Texas, beginning in 2012, and Mr. Katz and his colleagues at DLA represent Highland in this action as well. Daugherty seeks fact testimony from the requested deponents on five topics, all pertaining to the events surrounding the escrow as alleged in Daugherty's operative complaint.

The discovery Daugherty seeks is clearly within the bounds of Court of Chancery Rule 26. And, based on the privilege log Highland produced for the escrow-related documents, the requested deponents have personal knowledge of at least some of the escrow events.

The parties disagree on the threshold standard for evaluating whether counsel can be deposed. Highland contends this court has adopted the *Shelton* test, while Daugherty points to a series of

standards from *Rainbow Navigation*, *Sealy Mattress*, *Kaplan & Wyatt*, and *Dart*.

I note that in a transcript ruling from 2018 in *LendUS, LLC v. Goede*, Vice Chancellor Glasscock considered in the first instance whether it was necessary to gather the evidence sought from counsel, given the risk of disqualification. I agree this is a threshold consideration present in all the cases the parties have cited. And I conclude, like Vice Chancellor Glasscock did in *LendUS*, that Daugherty has not made a sufficient showing that he needs to depose Mr. Bookhout and Mr. Katz at this juncture.

As I just explained in my ruling on Daugherty's motion to compel, Daugherty will receive A&B's documents regarding the escrow. Daugherty can also depose the escrow agents. He can depose the Highland principals who were involved. And I do not see that any of this has happened yet. He should pursue those avenues before pursuing one that jeopardizes Highland's choice of counsel. His motions for commission for the proposed deponents are denied without prejudice.

I am mindful that trial is scheduled

for September, and that -- if Daugherty renews his motions after taking the rest of the fact discovery -- the risk of disqualification carries more prejudice to Highland the closer we get to trial. I also note that the discovery cutoff in this case is June 28, 2019. I am, therefore, interspersing an intermediate discovery cutoff.

Escrow discovery, including depositions of fact witnesses other than the requested deponents, must be complete by June 14th, 2019, and Daugherty must make any renewed motion for commission by June 17, 2019, with briefing on that motion to be expedited.

The burden this timeframe places on both parties I think is appropriate in light of the requested deponents' apparent knowledge of significant aspects of Daugherty's allegations, and in light of the desire to protect Highland's choice of counsel. Any renewed motion by Daugherty must demonstrate what gaps in the record he needs to fill, and why he believes the requested deponents can fill those gaps.

Mr. Uebler, is any of that unclear?

MR. UEBLER: Your Honor, nothing is unclear about that ruling, but I do have a question

about the escrow agent depositions. Can the parties assume that the ruling that the Court has made with respect to the documents will also apply to deposition testimony? in other words, categories that may be subject to privilege such as the subpoena response, but all other escrow-related categories would presumably be fair game and not subject to privilege in a deposition?

THE COURT: That's correct, at least as to A&B. I note that we haven't really tested the boundaries of where my ruling might go with regard to DLA. And I think that's probably another conversation we would need to have.

MR. UEBLER: Understood. Thank you.

THE COURT: Thank you.

Mr. Katz, is any of that unclear?

MR. KATZ: No, Your Honor. That's clear.

THE COURT: I'll give you-all maybe ten minutes to kind of regroup a little bit, and then I'll hear the motion for status quo order first.

We're in recess.

(Recess taken from 1:53 p.m. until 2:00 p.m.)

THE COURT: Mr. Uebler?

MR. UEBLER: Your Honor, my colleague, Mr. Christensen, is going to argue the status quo motion. But I'd just like to point out, we had an issue with our File & Serve converting Word documents to pdf, and it would drop the occasional citation in footnotes. I don't know if it's our system or theirs. But, in any event, we've brought revised copies of our papers with all the citations for the Court.

THE COURT: Thank you.

MR. UEBLER: You're welcome.

MR. CHRISTENSEN: Good afternoon, Your Honor. Joseph Christensen from McCollom D'Emilio for the plaintiff, Pat Daugherty.

I just want to start very briefly with how we got here. Your Honor is familiar with the facts, so I won't go over that in too much detail. But I do want to highlight some of the additional points that we included in our briefing related to what Highland was saying about these assets during the Texas action.

So Thomas Surgent, during the Texas action, he was the chief compliance officer of Highland. During the Texas action, he testified that the assets listed in the escrow agreement were being

held for Pat's benefit for his interest in HERA. These are all from Exhibit V. That one is at page 15 of 53.

Jim Dondero, the head of Highland, testified that Pat's share of all the assets, including the cash, is in escrow. He also testified that Pat's *pro rata* share of all the assets, including the cash, are all sitting in escrow. There's been nothing deducted or removed from Pat's account. And he also said that the escrow agreement was to protect Pat Daugherty.

The point of all these statements was to convince everybody who would listen that these assets were being held for Pat Daugherty, and that if he prevailed in the Texas action, he would obtain those assets. And we haven't done anything with them. We haven't offset any legal expenses, which is also noted in our reply brief.

Coupled with the statements that Pat continued to hold the HERA units, this was a clear expression that Highland was trying to convince people that they intended to hold onto these assets but give them to Pat if he prevailed in the Texas action.

In HERA's closing argument its counsel

said, "If Pat Daugherty happens to prevail in his lawsuit against Lane, Patrick and HERA you heard Jim Dondero testify he gets his interest, which is currently escrowed in the third-party escrow account, all of it."

And the jury clearly believed that the escrow meant to preserve Daugherty's interest. One of the questions the jury sent back to the judge in the Texas action referred to his -- that is Pat's -- HERA units currently in escrow. That's the third to the last page in Exhibit U.

The defendants now say, "Well, sure, Pat continued to be an owner of HERA, but there was never anything in HERA, at least during the Texas action and before the Texas action." Which reminds me of a scene from my life at a movie theater with my two sons, where the younger one was complaining that his brother wouldn't give him the box of candy. He asked me to intervene, and I told him to give him the box of candy, at which point the older brother emptied the candy into his popcorn and gave him the empty box.

That's exactly what happened here. When they told everyone they were holding assets for Pat's benefit, they would now have you believe that

what they really meant was that he was just entitled to an empty box, and they had no intention -- and Pat should have known that they never had any intention of ever letting him have them.

There are two possibilities to explain the contrast between what they said during the Texas action and what they're saying now. One is that they knew at the time that they were never going to give them back. The other is that they believed at the time and were sincere in saying that they would give them back, but they later changed their mind.

Under either of those circumstances, Daugherty prevails on at least one of his claims. If they changed their mind but initially intended it, his promissory estoppel claim is very strong. If they never intended from the beginning to give them to him, then his fraud and unjust enrichment claims are equally strong. The status quo order should be entered to make sure that they can't do either of those things this time.

I think that's all the background we need, except for a clarification on what Daugherty is seeking. He is seeking those assets. His relief -- Your Honor will note that we did not include in our

briefing any discussion of our claims for indemnification. Our indemnification claim is effectively a monetary relief sort of claim. But we did discuss promissory estoppel, unjust enrichment, and fraudulent transfer. Each one of those theories includes potential relief divesting those assets from whoever holds them, which brings me to the next point, which is that we do not know where these assets are.

We have asked the defendants where these assets are; were they ever transferred after December 2016. They told us they would not provide any information on those requests. And that's at our Exhibit L, Request No. 8 and 11, and Exhibit W, our Request No. 34 and 37.

THE COURT: I'm certainly not inviting more or different motions. But isn't the remedy for that a motion to compel instead of a motion for a status quo order?

MR. CHRISTENSEN: It would be. And we are not seeking through this status quo order effectively a back door to answering these requests for documents and interrogatories. But the fact that they will not tell us where these assets are is consistent with the prior behavior in the Texas action

and gives us a lot of pause about waiting until the end of this trial.

So we started out this case with -- I guess I should first turn to the defendants' argument that the Court doesn't have power to enter this status quo order. Clearly it does. The kind of relief that we're seeking is in aid of the ultimate relief that we are seeking. Because we are trying to obtain or move particular assets, we are seeking the status quo order to make sure those assets are still available for the court to issue an effective ruling at the end of this case.

THE COURT: And how do you get around the *Hillsboro* and *HEM* cases that discourage intermediate injunctive relief for the purpose of preserving assets?

MR. CHRISTENSEN: Well, I think generally the cases are referring to when you're seeking monetary relief. And that's not what we're doing in this case. And I think the history is probably the most important point in this situation.

One simply cannot ignore that the very assets and the very parties in this litigation -- the reason we're here is because we were chasing after

these assets that we believe we obtained the right to in the previous action. So it's a unique situation. None of the cases involve the same parties and the same assets.

And the cases -- even the cases that have history as a basis for granting the status quo order, none of them have this kind of sort of clear evidence that there was a fraud and moving of assets to defeat a judgment in an earlier iteration of the dispute between the parties.

THE COURT: And how does that sort of long history or long series of allegations of fraud and hiding assets, how does that square up with the requirement that the harm to be prevented by the status quo order be imminent?

MR. CHRISTENSEN: The imminence, Your Honor, to be frank, is probably the most difficult aspect of our situation to square with the law. Because -- in part because they haven't told us whether things have been transferred, where things are, we cannot give Your Honor very many facts about some imminent action that is going to take place.

But at the same time, we -- again, we started as a frog in a pot at a very high temperature

having come out of the experience in Texas. Then adding to that was the fact that they will not tell us where these assets are. They will not tell us whether they are currently in a solvent entity or not. They will not really just come out and say whether those assets are still in Highland or not. There's a suggestion in their brief that can be read as a representation that they are in the Highland and never have left, but they also make the argument in their brief that the assets never went over to Abrams & Bayliss; that during the whole time that Abrams & Bayliss was holding the assets, that really Highland held the assets, retained legal title, and Abrams & Bayliss was simply holding onto them in trust. We don't know if something like that is happening in this case either.

On top of that, we had -- and what spurred us to action was the affidavit of Highland saying that they did not have current assets to satisfy the judgment in the *Crusader Redeemer* action. So that's on the front end of that judgment. We, at this point, don't know what Highland is going to look like from a solvency standpoint on the back end of that after those assets have gone out the door, and so

at some point we have to act. We need to act before the end of this case.

We didn't believe that we had enough imminence at the beginning of this case that we would get a status quo order or a preliminary injunction. But when they filed that affidavit saying that in a cash flow basis they were insolvent for purposes of satisfying a judgment, against the backdrop of all the history, it starts to look like we're doing a replay of what happened in Texas.

Your Honor referred to, I think, a memo from Abrams & Bayliss talking about the HERA strategy. And what we're afraid of is that there is a HERA Strategy Version 2 that we do not know about right now and they just won't tell us. So at some point, in order to avoid them doing the same thing again, we have to act. We can't, unfortunately, identify when they're going to do that in the same clean kind of way that one often can in a status quo or preliminary injunction case. But the danger, I would submit, is just as high as in those cases.

I've talked some about the history. And the defendants do talk about three of the cases that we talked about regarding the history. They

address the *Crusader Redeemer* action that Your Honor is familiar with, the *UBS* litigation, and the *Acis*. The ones that they don't mention are *Trussway*, for example.

Trussway, in this court under Vice Chancellor Glasscock, he actually already found that the kind of history that one would have to establish to obtain a status quo order was found with respect to these principals. He said he took into account the "... prior history of the controllers of the entities in examining equitable matters that come before us." And true to the way he is, he said, "... I would just as soon not list all the reasons I have that make me suspicious that a remedy will not be available here ...." "But I think it suffices to say that I have experience with other cases involving the principals here." And he went on. That's from page 40 of Exhibit S, which is the transcript in the *Trussway* action.

On the next page he said that, "... given ... some of the factors that I've mentioned, including the Acis bankruptcy and my other experiences with the principals here ... there is a reasonable probability that without some action, any victory will

be a Pyrrhic victory."

THE COURT: It sounds like what you're suggesting is that given the track record of Highland in this action and in other actions, that you're suggesting that the imminence requirements be dispensed with because of what's going on here.

MR. CHRISTENSEN: I don't think I would say that, Your Honor. I would say that given the caginess on discovery, we are not able to identify the moment of imminence. But we are, through the history, able to establish the same point as imminence.

Imminence is this -- the point of addressing imminence is that if you don't address this, it is going to happen, and it's going to happen very soon. We can't tell you that it's going to happen very soon, but we can tell you that there's every reason to believe that it will happen before the end of this trial.

THE COURT: But what about the -- I think many times when one is considering imminence, there's sort of a *laches*-esque element that comes into it. And this case was filed in 2017. So this "it" that we're discussing very well may have already

happened.

And so I wonder what the justification is for sort of after the fact -- maybe, I don't know -- after the fact then seizing up Highland simply based on the way that things have played out in other cases.

MR. CHRISTENSEN: So I think I can explain why we didn't act earlier, and why it wouldn't have been justified to act earlier, and so why we shouldn't be subject to *laches* on this argument.

When we started, we had no reason to believe that those assets had gone anywhere other than Highland. Then the Acis bankruptcy discussed that Dondero was moving out tens of millions of dollars to his charitable foundation. That was another brick in the wall. Then we got the discovery responses that were not responsive.

And to be clear, we have not given up on that. We had a meet-and-confer as recently as this morning, and one on Friday of last week, in which we are trying to get these documents. It doesn't appear that we're going to have much success on our own. But we are absolutely pursuing that and have pursued those documents as vigorously as we pursued the Abrams &

Bayliss documents.

To mix the metaphors, the straw that broke the camel's back was the *Crusader Redeemer* action where Highland said: We cannot pay this judgment right now. We have more assets than liabilities, but we cannot pay this right now.

And it's also important to remember that it's not just large judgments that Highland has a history of not paying, and it's not only Daugherty's relatively small judgment that they refused to pay. But in the Acis bankruptcy, it was an $8 million claim at issue, and they made him go through -- or are still going through involuntary bankruptcy.

So I think we acted when it was prudent to act. And before that occurred, I don't think any member of this court would have been likely to give us relief without something to point to, a reason to believe that Highland wouldn't pay apart from the history.

THE COURT: And the reason is that affidavit in the *Redeemer* case stating that Highland doesn't have the liquid assets to pay the $175 million judgment? That's what you're interpreting to say that they will not pay or will somehow manage to avoid

paying Mr. Daugherty's -- what is allegedly owed to him?

MR. CHRISTENSEN: We aren't sure about the damages, but effectively, yes. That Highland -- which is, we assume, the most solvent of any of the entities -- now has a cash flow solvency issue. And so at that point we felt we needed to act.

THE COURT: Understand.

MR. CHRISTENSEN: The other thing that I think Your Honor should consider, it doesn't fit exactly within the three factors of a status quo or a preliminary injunction standard; but I think Your Honor should also take into account that it may not be a question of whether or not Highland is able to satisfy the judgment, but whether it will, even if it is able.

THE COURT: That's what I'm wondering. That's the part that I'm wondering how that's being derived from the affidavit in the *Redeemer* case, if that's the precipitating factor. Am I understanding you to read that affidavit only to inform solvency and not intent?

MR. CHRISTENSEN: It is consistent with an intent to make people work for their

judgments, but I mostly consider it separately. And what I'm really referring to, the short name for it is spite. It appears, if you look, not only at the previous action in Texas, but also the Josh Terry situation, that a major factor motivating whether or not Highland pays judgments is how Highland feels or how Jim Dondero feels about the people who are trying to collect that judgment.

And so you have the court in the bankruptcy case in *Acis* said that the expenditures were out of whack versus what's at stake. Or in the *Credit Strategies Fund* case -- which the defendants did not address -- the factual findings there refer to some notes from a call between those parties and Dondero. Those notes read, "Dondero directly threatens Concord and Brant personally. We are very good at being spiteful."

And so that spite doesn't -- it's not one of the factors normally considered on a status quo motion or a preliminary injunction. I do think, as a matter of equity, Your Honor ought to consider that. And I think it's consistent with, and maybe grows out of the kind of considerations that Vice Chancellor Glasscock was taking into account in the *Trussway*

action.

I think I'll skip to likelihood of success on the merits. We do think the likelihood of success on the merits prong of this analysis is fairly straightforward. At a big-picture level, Daugherty had a claim on these assets, either directly or through HERA. He was entitled to that compensation, he earned it, and it was taken from him after he proved his entitlement not only to damages -- which he received in the amount of 2.6 million and has never seen, but also the underlying assets.

So for fraudulent transfer purposes, we think actual intent to hinder, delay, or defraud based on the documents that we have seen so far is compelling evidence that there was actual intent to hinder, delay, or defraud.

Your Honor only has to find that we have a reasonable probability of success on one of our claims. You do not have to decide that we have a reasonable probability of success on all of them. And that comes out of the *Destra Targeted Income* case.

But we also think our other claims are quite strong, the alternative bases under fraudulent transfer law. We do not believe that HERA got

equivalent value, for example, in the transfer. Unjust enrichment, it's an equitable doctrine, so in some sense you back away and look at what really happened, what's the substance.

And again, what happened was Daugherty earned compensation, he proved his entitlement to it, and then it was taken from him. That enriched Highland; it impoverished Daugherty to the extent that he was entitled to it. There was obviously a connection between those two results.

And as far as their defense of justification, the evidence doesn't seem to show that. I take their justification argument to mean that they were justified in taking the money because of the legal expenses. But the bills that we have seen so far do not support that HERA was receiving the benefit of those legal expenses.

And just briefly on the promissory estoppel claim -- I'm not going to spend much time on that; you'll hear a lot about that in a minute. But I do want to refer to those quotations from the Texas trial as additional reasons that support our probability of success on the merits of that claim. They demonstrate that throughout the trial, the

strategy appears to have been to convince the jury that Highland was the good guy because they were -- don't worry, they're going to hold on to the assets for Pat. Pat is going to get those assets if he proves his entitlement to them. But -- you know, so don't think we're bad for taking them. Tell us that we win now and we don't have to give them to him.

The narrowest way to grant the motion, I think, is based on probability of success of the fraudulent transfer claim for actual intent to hinder, delay, or defraud. And Your Honor only needs to find that to issue the status quo order.

On the balance of equities, also seems very clear to us. On the one hand, our client would go through potentially another half a decade or decade of litigation if he has to chase these assets again. And it would be a real shame to have to do that twice. On the other hand, the defendants, the harm that they identify on their side is that it would lower the bar for future plaintiffs against Highland that are seeking monetary damages to obtain a status quo order. And on that point, I just have to point out, again, that it is not only monetary damages that we are seeking, but seeking to move the escrow assets.

The other harm that they identify is the harm to their reputation if they're required to freeze these assets for what I take them to perceive as a very small claim. But again, we're not only seeking monetary assets, so this is not just, as they characterize it, a $3 million claim but a claim on specific assets. And their history of paying small claims is not great. So we think the balance of equity also favors Daugherty.

Unless Your Honor has any other questions, that's all I have.

THE COURT: I don't. Not at this time. Thank you.

MR. REED: Good afternoon, Your Honor. John Reed from DLA Piper for the defendants.

First of all, I want to apologize for what happened at the last hearing. We were only into the case for like two days. I had no idea that the lawyer that was going to present was not going to be able to answer Your Honor's questions. I was not happy about that, probably much more unhappy than the Court was and the Court was very unhappy.

Mr. Katz is the lawyer most familiar with everything in this case. And he's here today to

present the arguments and should be able to answer all of Your Honor's questions.

THE COURT: I appreciate your comment. Thank you.

MR. KATZ: Your Honor, may I approach?

THE COURT: Yes.

MR. KATZ: Thank you for letting me be heard today.

And as Mr. Reed said, I echo his apologies for the last hearing. I apologize that I was not able to be here at that last hearing. But if Your Honor does have questions about -- I understand Your Honor's ruling, but if Your Honor does have questions about any of those matters, I'm happy to address those as well.

THE COURT: Thank you.

MR. KATZ: With respect to the status quo motion. Obviously, the Court is aware of the legal standard. I'm not going to go into that. I just want to address a few of the points that counsel addressed.

And I'd like to start with the irreparable harm element, which is one of the required elements. And counsel said a number of times that

they're seeking the assets, not just monetary relief. And I presume that that argument is being proffered because they recognize, otherwise, the issue with irreparable harm component that they have to show.

And I note, just by way of background, is that the Texas award was not in favor of Mr. Daugherty vis-a-vis HERA. It was not for specific assets; it was a monetary award. And, moreover, Mr. Daugherty never had ownership of -- direct ownership of any assets in HERA. Mr. Daugherty was a shareholder in an LLC and the LLC owned some assets.

So if their lawsuit is now seeking recovery of specific assets as opposed to monetary relief, I note that there's a host of procedural and substantive issues with that which I think goes well to the likelihood of success on the merits.

But the point for us today, Your Honor, is that a monetary award would certainly be sufficient to recompense Mr. Daugherty if he were to prevail on any of his claims in this case. And there's no evidence -- and maybe more importantly, there's no evidence that's been offered to the Court in support of the status quo motion that would demonstrate otherwise. And when I say "demonstrate

otherwise," demonstrate that there are assets that were in HERA that can't be valued, or some other basis to show some sort of irreparable harm. That issue is not even addressed.

We're -- this is, I think, very apparently a case that -- where there is no irreparable harm. And money can certainly compensate for any harm that Mr. Daugherty may be able to prove ultimately that he suffered. The only evidence on that issue, I think as Your Honor correctly pointed out, was the affidavit of Scott Ellington. And that affidavit says to the contrary. It says, "... the value of Highland's assets exceed[s] the amount of the ... Award."

There's absolutely no evidence in connection with the status quo motion that would show that there is irreparable harm or there is insolvency. In fact, what a good counsel wants to do is make allegations of what they believe is inappropriate conduct some by Highland, some by Highland's affiliates. And I note that the conduct that they've cited to in their motion are allegations taken from pleadings in other cases, as opposed to direct evidence of anything that has been done by Highland.

And most of it, again, is not directly Highland allegations to any extent.

There is -- and then also as Your Honor appropriately, I believe, questioned counsel about, there's no evidence of anything imminent on the horizon that might give rise to any potential concern that would support the status quo order. And what they're seeking is really, truly an extraordinary remedy. And I don't believe that they've pointed to any concrete basis which they can meet the high standard that they need to show to justify a status quo order.

THE COURT: How do you justify the situation here from the one in *Trussway*?

MR. KATZ: Well, I guess, Your Honor, in two ways. One, in *Trussway*, there's allegations of specific conduct. Where here, we've got -- there's no allegations of any conduct that they believe is about to occur or evidence to support that.

THE COURT: I suspect they would say that's because you haven't answered their questions, but I don't know.

MR. KATZ: Well, but, Your Honor, I guess that it would also go back to the irreparable

harm issue that, you know, there's nothing that -- even the allegations, that if they were able to provide some supportive allegations in this case as opposed to relying on allegations in other cases, there would still be -- they still have not shown that there's any risk of insolvency or potential irreparable harm.

And the *Mitsubishi* case that they cited in their brief I think is very on point. And on this issue where they had -- the Court noted that there was an allegation -- actually more than an allegation -- there actually was a prior incident that the Court had very serious concerns about but that on its own wasn't enough. It was -- the Court specifically found that the defendant in that case was insolvent. And they also found that there was a sale being negotiated, actual evidence of a sale, where the assets were going to be transferred. But we don't have that type of evidence with us in this case, Your Honor.

On the likelihood of success on the merits, Counsel spent a little bit of time on that issue. But I think it's important, Your Honor, again, that this is an extraordinary remedy they're seeking

that has a heightened standard. And their motion on the likelihood of success on the merits simply has conclusory allegations, that they believe they're going to be able to prevail on the merits without addressing the specific elements and what evidence they've got to show the specific elements.

I note, you know, Counsel, in a number of pleadings has -- and I know Your Honor has noted this as well -- that Judge Glasscock had expressed his skepticism about when he was trying to determine what the nature of the escrow agreement was. And I note that Judge Glasscock, when he was doing that, also when he was talking about the formation of the escrow agreement, he was not talking about the resignation of Abrams & Bayliss or the -- what happened to the assets that formerly were held by HERA.

And, in fact, even Judge Glasscock indicated at that time that it may be that this fraudulent transfer claim was appropriate for summary judgment. I think his direct quote -- I know I wrote it down. His direct quote was that it wasn't prepared -- on page 79 and 80 of the transcript, that, "It may be ... perfectly fit ... for a motion for summary judgment. I'm just not convinced I can get

rid of it on a motion to dismiss ...." That was his quote.

But I think that has been turned on its head a little bit to say that because he didn't understand the purpose of the escrow agreement and why that was formed, that somehow that shows that the fraudulent transfer claim is a sure-fire winner. In fact, I also note that Judge Glasscock dismissed the same fraudulent transfer claim against Mr. Dondero in the motion to dismiss.

So we think there's a number of problems with each of the claims. And I know we're going to get to the promissory estoppel claim. But I think a couple of issues with that is that we've got -- that claim is predicated on two statements that were by individuals that I don't believe were clear and unequivocal type of statements that could support a promissory estoppel claim. But moreover, they went to the representation of what was in the terms of the escrow agreement.

And I believe the law is fairly clear that if there is a contract provision that addresses the issue at hand, then you cannot have a promissory estoppel claim based on a representation about that

contract claim. And Mr. Daugherty is absolutely seeking relief pursuant to the provisions in the escrow agreement. And that, in and of itself, would knock out his promissory estoppel claim.

And then -- and maybe the biggest problem -- I think he's got a number of problems with the promissory estoppel claim, but maybe the biggest one is reasonable reliance. Again, Mr. Daugherty hasn't even alleged that any of the statements were made for the purpose of causing Mr. Daugherty to reasonably -- to rely, and that it would be reasonable to expect him to do so.

But Mr. Daugherty's conduct -- he alleges that he would not have paid the judgment and that he would have sought to invalidate the escrow agreement at trial. And I think both of those are -- they're also, again, conclusory allegations that he's made without sufficient -- he has not made allegations in his complaint in this action sufficient to withstand, I believe, a motion to dismiss, and certainly not to show a likelihood of success on the merits for the status quo motion.

But what he's really said and what he explained in the briefing that he meant by that is

that he would have sought offset. The problem that Mr. Daugherty has there is he -- offset is an affirmative defense.

THE COURT: I mean, we're all about to get into that very deeply, so ...

MR. KATZ: Okay, Your Honor. Thank you, I appreciate that.

But the likelihood of success on the merits on the promissory estoppel claim, I think, is very low. He's got similar issues on the unjust enrichment claim because of the representations and because of the equivalent value that HERA received in exchange for the assets.

On the fraudulent transfer claim, we don't believe that there was a transfer and there's been evidence of a transfer. And Counsel may respond to that and say, "Well, that's because Highland hasn't shown where the assets are." I'm anticipating that to be their response on that.

But I think Your Honor identified the point that that's not why you get a status quo motion. If they think there's evidence that they need, you know, there's a motion to compel. But for purposes of their motion, they have not produced any -- have not

cited to any evidence, have not even made the allegation that -- other than a conclusory allegation -- that they have a likelihood to succeed on the merits.

And then finally, Your Honor, I think they have the same -- the last element, that with the harm to him, the harm to Mr. Daugherty would outweigh the harm to Highland. They simply have a conclusory allegation in their motion without providing any support for that, Your Honor.

And again, I just -- I'm happy to talk about that issue further, but I think on a motion of this seriousness with the heightened standard, that they need to show that conclusory allegations are not sufficient.

THE COURT: Thank you.

MR. KATZ: Thank you, Your Honor.

MR. CHRISTENSEN: Just briefly, Your Honor.

I suppose it's an interesting philosophy of language, a question of what counts as something being conclusory. But we have certainly done more than offer a conclusion. We have laid out a timeline of actual intent to delay or defraud with

respect to the fraudulent transfer claim.

And just the items that are attached to our motion at Exhibit N, O, P, and Q, are a series of e-mails and events that I think anybody bringing a fraudulent transfer claim might characterize any one of them as a smoking gun. That is more than a conclusion. Our conclusion that this transfer was done with actual intent to defraud is based on very particular, very detailed, minute-by-minute documents. So it is certainly not conclusory. It's sort of conclusory to call that conclusory.

And it's important, also, to remember that when Vice Chancellor Glasscock suggested that potentially the fraudulent transfer claim could be fit for summary judgment disposition, he also said things like "Maybe there's a perfectly reasonable explanation for this." I think discovery has shown that there is not a perfectly reasonable explanation for this. And he did not have access to those documents, nor did we at the time that he made that statement.

As far as seeking this relief rather than simply monetary damages, that has been in our complaint since the beginning.

THE COURT: What is the -- can you

address the point that the Texas award is monetary and not for the specific assets that are mentioned now in your briefing?

MR. CHRISTENSEN: Sure. I can.

I'll address that by saying, quoting again HERA's closing argument in the Texas trial. "... [I]f Pat Daugherty happens to prevail in his lawsuit against Lane, Patrick and HERA you heard Jim Dondero testify, he gets his interest, which is currently escrowed in the third-party escrow account, all of it."

We have made a claim for promissory estoppel that statements like that with codefendants show clear evidence of a promissory estoppel claim. That kind of statement shows how the statement was meant to be perceived, it shows how people did perceive it.

And I want to go to the jury question because we actually have -- unlike many cases where the idea of an objective standard, what would a reasonable person do, is sort of an academic question. But in this case we have a jury, which is sort of the quintessential reasonable person, writing back to the judge, "If we assign a dollar value to 'Fair Market

Value of Daugherty's HERA units' in Question 18" -- that's the question that awarded him $2.6 million -- "is this in exchange for his HERA units currently in escrow, or in addition to them?" The judge instructed back, "Do not discuss or consider the effect your answers will have."

And then the final judgment made clear that it was not in exchange for those assets in escrow, that it was in addition to them. And there was appellate litigation about that issue, and it was settled that it was not a replacement for those units. But my point really is: We have very clear evidence that the Texas judgment and the people making the Texas judgment believed that those assets were being held in escrow for Pat Daugherty, which is exactly what the defendants tried to tell the jury to believe in their closing arguments.

So the fact that the Texas judgment was purely monetary is, A, not entirely true; and, B, it's not -- does not defeat the promises that they made throughout that trial, nor the fact that they transferred the assets once the judgment came through.

Let's see. On the promissory estoppel claim, it's just not what they said at trial, that Pat

Daugherty had an interest in this LLC but, by the way, there's nothing in it. So if you award him anything, it's going to be completely valueless.

I want to respond just briefly to the point that these assets can be valued. And they can be. This court is very experienced in appraisals. But the easiest and most efficient way to deal with this, the value, is to give the assets themselves rather than require, effectively, a -- more than one appraisal inside of this case, because there are assets held by a private equity fund, and those assets include private companies. So we would have to have a sort of quasi-appraisal action contained inside of this, instead of doing what is much easier for the parties and the Court and just addressing those assets in an equitable manner and providing an equitable remedy.

The affidavit does say that they are solvent. I believe the affidavit was also given by the same person that the -- it was either the arbitration panel in *Credit Strategies Fund* or the Bankruptcy Court in *Acis* said that Isaac Levinson's statements were not credible and that his statements contradicted documentary evidence in a clear way.

In addition, they don't say by how much they are solvent. It could be the case, based on the face of that affidavit, that they are solvent by a million dollars. We simply don't know. And again, the question of solvency as it relates to irreparable harm in most of these cases is in a sort of antiseptic environment where it really is just a matter of: Does this party have sufficient assets?

And again, that's not the only question in this case. The question in this case is: If the Court does nothing, what is the risk that Highland will do exactly what it has done to these assets vis-a-vis this litigant before?

That's all I have, Your Honor.

THE COURT: Thank you.

My intention is to hear the status quo order and the motion to dismiss and then take a break and see if I can get something together to share my thoughts. So let's move on to the motion to dismiss, unless folks want to take a short break.

MR. KATZ: I'm prepared to proceed, unless Counsel wants a break.

MR. UEBLER: I'm prepared to go forward.

THE COURT: All right. You may proceed.

MR. KATZ: Thank you, Your Honor.

So I won't belabor the procedural background, because I know Your Honor is familiar with it, other than to say that after Judge Glasscock had dismissed a large number of Mr. Daugherty's claims, there was -- a promissory estoppel claim was then added. And we filed the motion to dismiss as to that claim, and that's the motion that we're here for today.

To prevail on a promissory estoppel claim, Mr. Daugherty has to allege a conceivable set of circumstances that would allow a showing that there was a promise that was made, that it was reasonable, that the expectation of the promisor was to induce the action of forbearance on the part of the promisee, that the promisee reasonably relied on the promise and took action to his detriment, and such promise is binding because injustice can be avoided only by enforcement of the promise.

And I do want to -- I will be efficient, but I want to address each of these elements, Your Honor. And the -- I want to start with

the reasonable reliance. As I mentioned a moment ago in connection with the status quo order, that Mr. Daugherty is really claiming that he would have sought offset had Mr. Dondero -- actually, I apologize, I want to take a quick step back.

Although Counsel's pointed to a closing argument of HERA, that I believe he attributed to Highland's counsel, I just want to be clear for the record that the statement that Counsel just read from the closing argument was for HERA, not for Highland, and there was separate counsel.

THE COURT: Hasn't there separately been an assertion of a common interest?

MR. KATZ: There was, Your Honor. But I just believe Counsel -- I'm sure it was inadvertent -- said "Highland." And I just want to be clear for the record that that statement was on behalf of HERA at closing argument.

But, more importantly, in the complaint they only allege two statements: a statement by Jim Dondero at trial and a statement by Mr. Klos in a declaration made several months after the final judgment. And so when Mr. Daugherty claims that his reasonable reliance was not seeking offset at the

trial, the second statement can't be a basis of that; and the issue that Mr. Daugherty has, that there can't be a reasonably conceivable set of circumstances to show reasonable reliance for a couple of reasons.

One, the date that Mr. Daugherty filed his counterclaims with his claims, he had -- the LLC agreement with Highland's offset provision against the value of HERA was in that document. In fact, that was the basis of one of Mr. Daugherty's claims, that there was going to be -- there was the risk of this improper offset. He was challenging those provisions.

But yet he never pled offset as a defense. And it is a required affirmative defense under Texas law. And it is clear that when the final judgment was entered, that's *res judicata*, that issue was barred.

So Mr. Daugherty is saying that now had Jim Dondero not testified as he did on the stand, that he would have filed the declaratory judgment action to offset the judgment that Highland obtained against him from the judgment he obtained against HERA cannot serve as the basis for a promissory estoppel claim in this action because he would be barred as a matter of law.

THE COURT: Is that a little too technical? I mean, is the point a little more abstract than that, which is that had Dondero not testified as he did and assured everyone in the courtroom that the escrow was there for Daugherty's satisfaction down the road, that there are plenty of different options he could have taken? I mean, any sort of resistance or leverage or anything like that in regards to paying his own judgment, whether or not a technical offset was procedurally available to him, seems to be kind of reducing this a little bit too far down into the technicalities.

MR. KATZ: Well, I don't believe so, for two reasons. But the most important one being there's no reasonably conceivable set of circumstances where he could have taken action. And I'll address that momentarily.

But to the point, that was his response. That's what's in his pleading, both in his complaint and in response to the motion to dismiss. That's what he said he would have done. And that wasn't available to him.

And it wasn't just filing a declaratory judgment action for offset that he would

have been barred from doing. He had two years to plead offset as a defense or to plead facts in the Texas action that arguably could have given rise to some reliance claim.

THE COURT: It seems odd to claim that there was no reliance because he didn't do something before the act in question happened.

MR. KATZ: Well, Your Honor, in fact, quite the opposite. As Mr. Daugherty said in his reply brief to the status quo motion -- and this is on page 2 and 3 of Daugherty's reply brief -- "In fact, during the trial and before Daugherty won his judgment, Defendants stressed that Daugherty was an owner of HERA units." Then he puts in a footnote, "At the same time, Defendants took the position that Daugherty held no economic interest in HERA. Accordingly, Daugherty did not take the purported admissions at face value and litigated for a judgment that he retained his HERA units."

And the significance of that, Your Honor -- it's the same significance as what I was trying to say a moment ago and I probably did not say it very clearly -- is from the moment he filed this claim, he was aware that, as he says here, that his

value -- the value of his shares in HERA were valueless, as Highland was saying they were. Because that was one of his claims in the lawsuit. And he did not do anything to try to protect that vis-a-vis a judgment that Highland might get against him at any time during the trial.

So to think that, "Oh, well, he was about to do it" after two years, knowing everything that he knew, the LLC agreement allowing the offset, Highland taking the position that his units were valueless even though he was suing for it, that somehow he was going to try to offset his claim against HERA against Highland's claim against him, and he just didn't do it because Jim made the statement he did on the stand is not a reasonably credible position. It's not something that could have a -- or there could be a reasonably conceivable set of circumstances to show a reasonable and detrimental reliance.

And I think -- and, Your Honor, if you also look at the whole circumstances around Mr. Dondero's statement on the stand, was not -- in fact, the question -- it was by HERA's counsel that was questioning him at the time. And the question

was: The assets that are being escrowed, or the money that's being escrowed right now, what happens to them? And I think it's significant for a couple of reasons.

One, right now they're talking about the day that the question was asked. They're not talking about a day in the future. And I think it's also significant that that was --

THE COURT: Maybe that was the question, but the answer was, "In the future they will go to him."

MR. KATZ: That's -- Your Honor, respectfully, that's not the way I read it. But I think the point is -- two points, Your Honor. One, that was a question by HERA's counsel; that was not a question by Daugherty's counsel.

If this was so important that Daugherty was going to forego seeking to invalidate the escrow agreement or trying to do trial amendment and get a new claim in, there was no action by his counsel to follow up and say: Let's be clear. Let's not talk about right now, let's talk about in the future. And again -- or ask about what about the resignation provisions, what about the termination provisions.

There's a whole host of conditional circumstances that show that Mr. Daugherty, purportedly relying on that statement to not try to bring a declaratory judgment action for offset or to seek to invalidate the escrow agreement would have been reasonable reliance. Again -- because, in fact, up until that point, Mr. Daugherty not only waited two years, he waited past the amended pleading deadlines. In the face of what he says, I'm being told by Highland that my assets are valueless. You know, and to the extent they say that I'm still owning HERA units, I never believed that there was anything there. But yet he didn't do anything about it before Mr. Dondero made the statement to HERA's counsel.

So, again, all of those, all of that goes to whether he could have -- show any circumstance where he could have reasonably relied.

Similarly, I think if you look -- and I bring in these things to show Your Honor what is not in the complaint or not in the response to the motion to dismiss. After the judgment, he claims that he was entitled to this offset, but yet he paid his full judgment. He could have just paid the difference in the judgment.

THE COURT: That's the point, is that he paid the whole judgment; right? Kind of chipperly wrote the check and thought it was all going to work out in the end.

MR. KATZ: Right. Well, without -- but with the whole circumstances and you look at his allegations, if his allegations are to be believed, it's not reasonable to believe that somebody who was going to do what he did but for Jim Dondero's statement would have, again, waited for two years, not filed -- not done -- taken the legal actions that he's now claiming he would have taken.

He did seek to amend his pleadings right before trial. These were not in there. That was, again, before these statements. Again, it's not credible to believe that he reasonably relied. And he hasn't alleged anything.

Again -- and so that was why I said initially to Your Honor's question, there are two points. One, when you look at the totality of what he didn't allege and what he didn't do, that there can be no set of circumstances where he reasonably relied, but then when you look at what he says he would have done, which is the offset. And he would have been

legally barred from doing that because he waived it. Also because -- and the law is cited in our motion, that because Highland and HERA are separate entities, there wouldn't have been an offset between those judgments anyway.

So the two things he says that he would have done was seek to invalidate the escrow; which, again, he was aware of that escrow agreement before trial. He sought to amend his pleadings before trial but did not address that escrow agreement at all.

He has shown that he believes that his -- before Mr. Dondero made that statement, he didn't -- he thought his HERA units had been rendered valueless and that's how he was litigating the case. But he didn't try to "invalidate" the escrow agreement. He also doesn't explain or provide any allegation of what that means, to invalidate the escrow settlement.

He doesn't provide any legal theory or allegation of evidence to support a legal theory that would show that had he sought to invalidate the escrow agreement that the court would have allowed that amendment and it would have changed the outcome.

The next element I want to talk about was that a promise was made. And, again, he's identified two promises: one by David Klos, one by Jim Dondero. There's -- the one by Mr. Klos, again, was done several months after trial. The one by Mr. Dondero is obviously during trial. But both of those statements, when you look at them, are not unequivocal statements of -- there was no set of circumstances where Mr. Daugherty will not be paid this money on a final, nonappealable judgment. And -- which is what --

THE COURT: Why is that not exactly what Mr. Dondero said?

MR. KATZ: Well, Your Honor, Mr. Dondero was being asked a question about the language in the escrow agreement, that specific provision. And he was being asked based on circumstances right now. And perhaps if I give you an analogy. If I hire an employee and I'm paying the employee $50,000 a year and they're an at-will employee, and somebody asks me, "Well, how much does that employee make?" I'm not likely going to say, "Well, annually $50,000 a year, but I can terminate them at any time." Or "$50,000 a year, but less

withholding," or other caveats.

And the question that was asked to Mr. Dondero is the -- right now the assets that are -- and I apologize, I don't -- I can grab the quotation. I don't have it right in front of me. But the key part was that it was predicated on right now, what happens right now if there's a final judgment.

So -- and, again, this is Mr. Dondero who's an individual defendant who is not being questioned as a representative of Highland. And what they want to do is take that statement and say this is an unequivocal statement that was binding Highland. And it just doesn't rise to that level under the legal standard.

And, you know -- but, moreover -- again, because what -- Mr. Dondero was reading the escrow agreement on the stand as a layman, but that's really more significantly the point, is that if the alleged promises are subject to termination by a contract -- I know this is in our pleading, the *TrueBlue HRS Holding* case -- promissory estoppel does not apply where a fully integrated and enforceable contract governs the promise at issue.

And that's the issue, is the contract

is the contract; it means what it means. And the -- unless there -- I don't believe, Your Honor, that they even alleged that there is some promise, unequivocal promise, that Mr. Dondero or Mr. Klos made that was not subsumed by the escrow agreement. And that's really the basis of their claim here.

They also have to show that the claim is necessary to avoid injustice. And obviously, they have brought a fraudulent transfer claim and an unjust enrichment claim arising out of the same course of conduct, that they claim these representations are related to those claims. And I think the case law is fairly clear on this, that this is exactly the type of situation where a promissory estoppel claim is not necessary to avoid injustice.

THE COURT: But is the conclusion to be taken from your argument that nothing can ever be pled in the alternative to a promissory estoppel claim?

MR. KATZ: No, not at all. But I believe that you would have to have a set of circumstances where there wasn't a fully integrated enforceable contract, and that the underlying promises weren't about the interpretation of that contract.

And then, finally, Your Honor, I'm going to use the word "conclusory" again, that they -- well, actually not even conclusory, Your Honor. They didn't even plead that Highland intended to induce reliance or that Highland should have reasonably expected to induce reliance by Mr. Daugherty.

And I don't think that's necessarily an accident. I think that's because the statements that they're relying on were not statements that were made on behalf of Highland. They're individual statements. And I think that it would be fairly tortured to say otherwise.

So, Your Honor, again, for each of those reasons, we don't think that they have pled any reasonably conceivable set of circumstances that could support the promissory estoppel claim.

THE COURT: Thank you.

MR. KATZ: Thank you, Your Honor.

MR. UEBLER: Good afternoon again, Your Honor.

THE COURT: Good afternoon.

MR. UEBLER: I'll start with the promise that was made. And before I do, I think I heard Mr. Katz talking about the standard to prevail

on a claim. And I understand we're a little bit late in the game of this lawsuit. But this is a 12(b)(6) motion and the standard is reasonably conceivable.

So I just want to reset where we are on this motion and talk about the promise that was made, briefly. So what was the promise? The promise was Jim Dondero testifying at trial, under oath, that Mr. Daugherty's assets would be held in escrow and released to him through HERA if he won in Texas. I mean, it was as simple as that.

You may have been left with the impression from Mr. Katz's presentation that the line of questioning was about the terms of the escrow agreement. I can save all of us and just refer to the pages of the testimony, or I'd be glad to read the preceding three or four questions to set that up. But it was not interpreting the escrow agreement. And Mr. Katz didn't have the testimony on hand, but I do. And the question was:

"Question: Okay, so -- so if Mr. Daugherty somehow prevails in his lawsuit against Patrick Boyce and Lane Britian and HERA, what happens to Mr. Daugherty's interest that's being escrowed right now with a third-party escrow agent?

"Answer: They go to him.

"Question: I'm sorry?

"Answer: They go to him via to HERA and then to him."

Is that promise consistent with the escrow agreement? Yes. Is that promise separate and apart from the escrow agreement? Yes. Mr. Dondero wasn't there interpreting a contract. He was there making a promise to Daugherty and to the jury.

And just as we allege in paragraph 131 of our complaint, it was the reasonable expectation of Highland, when that promise was made, that it was going to be relied on.

THE COURT: Tell me more how the statement was separate and apart from the contract.

MR. UEBLER: The statement is separate and apart from the contract because I think -- Mr. Katz would be the first one to tell you that Mr. Daugherty was not a party to the escrow agreement. Mr. Daugherty, on the face of it, has no rights under that escrow agreement.

So this idea that Highland proposes that because there's a contract out there that also addresses the subject matter of the promise, the

promisee is, therefore, precluded from relying on that promise, it just -- it doesn't hold water. They don't -- they didn't cite any cases.

We said it's not the law of Delaware and never should be. Highland shouldn't be allowed to contract with Abrams & Bayliss and then use that contract to say that a promise made to Daugherty that Daugherty seeks to enforce, that is -- you know, follows the terms of that contract but doesn't expressly give any rights to Daugherty, that's just -- that's not an argument that the Court should accept, in our view. So that's why I say it's separate from the contract.

And that also gets into the alternative claim argument, too. Are we entitled to bring promissory estoppel and a fraudulent transfer claim and an unjust enrichment claim? I think the *Chrysler* case in the Supreme Court settled that question a long time ago. And I think Rule 8 of this court does, too.

So, of course, there's overlap in what was promised and what's in the escrow. Although, I will point out, the escrow -- Mr. Katz said something like -- he referred to a host of conditional

circumstances in the escrow agreement. And I think his point was paragraph 5 and paragraph 10 that they had relied on when Abrams & Bayliss resigned. Well, you won't find any of that in the promise that was made by Jim Dondero under oath to Pat Daugherty and the jury. So whatever conditional circumstances may be in that contract, they're not in that promise.

And the notion that Jim Dondero was testifying in his individual capacity, I think we debunked that in Exhibit A to our answering brief -- which was Highland's own witness list -- that provided an entire paragraph of what Mr. Dondero would be testifying about, including testimony in support of Highland's and Cornerstone's claims against Daugherty and the damages suffered and the third-party defendants' defenses to claims asserted against them.

So Jim Dondero is Highland. He is HERA. He's HERA ERA management. He controls them all. Mr. Katz pointed out that the closing argument by HERA's lawyer in Texas was just HERA's lawyer. Well, Jim Dondero controls HERA, just as he controls Highland. So I view that as a distinction without a difference.

But what that closing argument did was

reaffirm the promise -- I thought I had it here. So what was said on closing argument by HERA's counsel, just after Jim Dondero made the promise, was "... if Pat Daugherty happens to prevail in his lawsuit against Lane, Patrick and HERA you heard Jim Dondero testify he gets his interest, which is currently escrowed in the third-party escrow account, all of it."

Then we had the other promise, which was that September -- September of 2014, the Klos affidavit. It restated the promise. This gets to the reasonableness of the reliance of Daugherty's promise -- the promise to Daugherty. He kept hearing this.

And the idea that Daugherty should have somehow foreseen in either the six weeks between when Highland sprung the escrow agreement on him before trial or when Dondero testified or when Klos submitted his affidavit -- by the way, as the senior finance of Highland Capital -- that Daugherty should have foreseen two years from now when he went to pay the judgment that Highland was going to break that promise.

So the idea that Daugherty should have

done something between December 2013 and December of 2016, I think entirely misses the point of our claim. The reliance that we allege -- and it's paragraph 133 of our complaint -- is "In further reliance on the promises of Highland Capital and its agents, on December 14, 2016, nine days after Highland Capital secretly obtained the Escrow funds, Daugherty wired approximately $3.2 million in cash to Highland Capital in satisfaction of its award of attorneys' fees in the Texas Action."

That was the reliance. What could have been done, other than a cash payment, Daugherty could have just engaged in self-help. He could have paid the difference between the 2.6 and the 2.8 of the judgments. He could have not paid anything at all. He at least should have had the chance to go to court like the petitioner did in the *Bonham Bank* case that we cite from Texas to explain to a judge why, under these circumstances, even though there are three different litigants involved, these claims should be offset. But he didn't even get that chance because he relied on Highland's promises and he wired the full amount. They took away that chance from him.

We don't have to prove today whether

he would have won on that setoff claim in Texas or anywhere else. We just have to prove that it's reasonably conceivable that he was deprived of that chance because he reasonably relied, to his detriment, on a promise that was made under oath and repeated.

In their opening brief, the defendants stated that "Injustice can (and should) be avoided through collection efforts in the Texas Action, which Daugherty has not even attempted to pursue, making this claim premature."

I just wanted to point out, this was in Exhibit B to Highland's own opening brief. They attached Mr. Daugherty's interrogatory responses. And if you look at Interrogatory 36 on page 25, Mr. Daugherty stated that "... apart from filing this action to collect his Texas judgment, he filed for a writ of execution in Texas on July 7, 2017, which was unsuccessful because Highland Capital claimed HERA had no assets. The return of service was dated September 26, 2017."

I think that's totally irrelevant to the questions before the Court, but I wanted to point out that Mr. Daugherty did, in fact, attempt some collection efforts in Texas and those were

unsuccessful.

I'd also like to point out that in addition to being able to plead alternative claims, this is one of those cases where injustice can only be avoided through the enforcement of this promise, notwithstanding the other claims out there. The injustice to be avoided is allowing Highland Capital to walk away with both judgments from the Texas action. They got Daugherty's 3.2 million, and they got his HERA assets. And that's the injustice to be avoided.

When you and Mr. Katz were discussing this element, he referred to a fully integrated contract. Again, he would be the first to tell you, I'm sure, that Daugherty has no rights under that fully integrated contract. So the fact that there is a similar contract out there is not relevant to the analysis.

That's all I have, Your Honor.

THE COURT: Thank you.

MR. UEBLER: Thank you.

MR. KATZ: Your Honor, can I just address a couple points?

THE COURT: Yes.

MR. KATZ: For clarity purposes, Counsel -- this is the second time they've read the statement from HERA's counsel during the closing argument. That was not part of the statements that were alleged to be part of the detrimental reliance in either the complaint or in the response to the motion to dismiss.

And I think that's significant, again, because Counsel is certainly correct that what they say is that Daugherty would not have paid the judgment against him by Highland. But their explanation of what that means is that he would have sought offset or sought to invalidate the escrow agreement, both of which could only have been done, been sought, during trial. I suspect that's why they are not relying on the statement that was made at closing argument where it would have been too late for them to make those allegations.

Highland had a judgment, a fully perfected final judgment, collectible judgment that Mr. Daugherty paid. And from the motion to dismiss perspective, claiming that he would have filed either or both of two things that were barred by *res judicata* does not provide the basis to avoid -- where there's a

reasonably conceivable set of circumstances that those allegations could support to avoid a motion to dismiss.

And, again, we're really just talking about Jim Dondero's statement because, as Counsel recognized, the Klos statement was made, I believe, roughly five months after the -- four or five months after the final judgment was entered.

And then, finally, lastly, I just want to touch on the escrow agreement. Of course we recognize Mr. Daugherty is not a party to that agreement. But Mr. Daugherty's case is that he is asserting rights under that escrow agreement. He is certainly saying that there was a transfer under that agreement and that that agreement required the assets, the money being held pursuant to that escrow agreement, to go to HERA, which then Mr. Daugherty as the shareholder of HERA would have had rights to.

And, you know, we disagree with some of the underlying factual basis. We don't agree that there was a transfer. But I think counsel for Mr. Daugherty would certainly not say that there's not a fully enforceable promise in that escrow agreement that they are seeking relief under.

And that's -- and just as importantly, Mr. Dondero's statement was exclusively an interpretation of that promise. And that's why -- and I think that's exactly what the *TrueBlue* case is referring to. And there's a fully integrated contract that has the promise that legally and factually determines what the rights under that contract are.

And Mr. Dondero's interpretation of that contract -- even if it's the exact same as the contract or even if it's different than the contract -- doesn't change that the claim is pursuant to the contract and not for promissory estoppel.

THE COURT: What is your understanding of Mr. Daugherty's ability to sue to enforce the escrow agreement in a way that benefits him?

MR. KATZ: Well, he is a shareholder of HERA. And as a shareholder of HERA -- I mean, I'd have to think through all the *res judicata*, collateral estoppel, statute of limitations issues that all have come out about all the issues that have been litigated.

THE COURT: I just mean from the terms of the contract.

MR. KATZ: I don't believe that

Mr. Daugherty is a third-party beneficiary of the contract, if that's Your Honor's question. He's certainly not a direct party to the contract, but he is a shareholder of HERA. And their allegations are that Highland was contractually obligated to send money to HERA under that agreement.

I think there are potentially technical legal issues under that. That's, of course, not the claim that Mr. Daugherty has brought. And -- but if Mr. Daugherty had any rights, it would be through HERA.

THE COURT: So is it your understanding that the point of the doctrine that you're relying on, that there can't be both a contract and a claim for promissory estoppel, is that those rights substantially overlap?

MR. KATZ: I would suspect that's probably the policy reason behind those decisions.

THE COURT: So if Mr. Daugherty doesn't have contractual rights under the escrow agreement, why does that knock out his promissory estoppel claim?

MR. KATZ: Because it's the same -- because whatever rights he has under the contract,

whether he has rights or not, are no different than any rights he would have vis-a-vis Mr. Dondero's interpretation of what that contract said, what that contractual language says.

THE COURT: Go ahead.

MR. KATZ: I think that the policy is is not to create quasi-contractual claims when there is a contract, regardless of who's the party to the contract.

And, actually, I think it's even -- there's no wiggle room around this situation because it's not -- Mr. Dondero was -- I mean, I think the quote was, "They go to Mr. Daugherty through HERA" is the quote. He wasn't saying something -- there's not been an allegation, for example, that Mr. Dondero's statement or Mr. Klos' statement created a separate contract between Mr. Dondero or Mr. Daugherty.

I mean -- and that's not what -- I mean, there hasn't been an allegation that that's what they were saying -- that Mr. Dondero was saying that or Mr. Klos was saying that. The allegation is they were saying that's what the contract, the escrow agreement, means. And that's why you can't have a separate claim, because the contract means what it is

and the contract determines the rights.

THE COURT: I understand.

MR. KATZ: Thank you, Your Honor.

THE COURT: Thank you.

MR. UEBLER: May I, briefly?

THE COURT: Briefly.

MR. UEBLER: Just to be clear, Your Honor, we very much rely on the Klos statement as a separate promise on behalf of Highland in the affidavit. We think it also supports the reasonableness of the reliance on Mr. Dondero's promise on behalf of Highland. But we view the Klos affidavit as part of the promise generally.

With respect to the closing argument by HERA, we didn't use it sooner because we just -- actually, I have to give credit where credit is due -- my colleague, Mr. Christensen just found it. We didn't try the Texas case, so we did find it in the record.

And fortunately for us, Highland agrees on pages 13 and 14 of their own motion to dismiss that the Court can "[consider] additional materials from related litigation that were not attached to the complaint if the plaintiff relied on

those materials in casting his complaint, as Daugherty has done with regard to the Texas Action."

The last paragraph on page 14 goes on to say, "To the extent the Court finds that the Texas Action materials are not already subject to consideration based on Daugherty's extensive reliance on them, Defendants respectfully request that the Court take judicial notice of the documents under Delaware Rule of Evidence 202(d)(2)."

So we submit that the Court certainly can consider the trial transcript from the Texas action as further support for the reasonableness of Mr. Daugherty's reliance.

And my final point with respect to the escrow agreement and the notion -- I think that what Mr. Katz said is that Daugherty, in his view, has no direct rights under that agreement. The only real direct relevance of the escrow agreement with respect to the promissory estoppel claim is that it's even more evidence of the reasonableness of Mr. Daugherty's reliance on the promise because it's consistent with that promise.

Thank you, Your Honor.

THE COURT: Thank you.

Anything to -- Mr. Katz, I'll give you the last word.

MR. KATZ: No, Your Honor.

Just to address Counsel's last point about just finding the statement. You know, again, I think that the issue is what did Mr. Daugherty actually rely on. Their claim is that when he wired $3.2 million -- not what statements Counsel has found in the record recently that could be retroactively applied that way.

And Counsel's -- again, the complaint that is in front of Your Honor that has the allegations rely on the two statements and is very clear that -- it is explained in their briefing -- that the remedies -- that the detrimental reliance was forbearance from taking action in the Texas lawsuit.

So anything that occurred anytime after they could raise issues in a Texas lawsuit could not have been a basis for detrimental reliance.

THE COURT: Thank you.

I'm going to take a recess. It will be at least 20 minutes. So stretch your legs, do whatever. It'll probably be longer than that. But -- thanks for your patience, but it's faster this way in

the short term.

So we are in recess.

(Recess taken from 3:35 p.m. until 4:18 p.m.)

THE COURT: Thank you for your patience.

I'm going to start with the motion for a status quo order. It is denied. We have some time constraints this afternoon, so I will cut to the chase. Daugherty has not established a threat of imminent irreparable harm as he must. It is clear that Daugherty is pursuing this relief now based on what happened in the *Redeemer* case. This complaint was filed in July 2017, and he did not seek the relief that he's now seeking until after the papers on the status quo order dispute were filed in the *Redeemer* case. And Daugherty cites Highland's submissions in that case in his brief.

I disagree with Daugherty's reading of the *Redeemer* papers as indicating that Highland is in "severe financial distress" and is "unable to satisfy" the arbitration judgment at issue there. And the facts are very different as between the two cases. Before going to arbitration, there were issues involving control over assets that led to Highland

making representations to the Court in the *Redeemer* case. And in the more recent request for a status quo order related to confirming an arbitration judgment, there was no separate claim that this court needed to adjudicate, like Daugherty's fraudulent transfer claim here.

And, finally, the *Redeemer* parties ultimately stipulated to a status quo order. So I don't think that anything that this court did in entering the agreed-upon status quo order is helpful in deciding whether to issue one in this case.

Daugherty says that Highland has a pattern of avoiding judgments, but has given me no reason to think that Highland is going to do something between now and a post-trial opinion that would make it incapable of satisfying a judgment, nor is there anything in the *Redeemer* case that leads me to believe that.

Quite frankly, if Highland is as good at avoiding judgments as Daugherty claims, Highland would have already moved the assets. Daugherty, in his reply, touches on that point and raises concerns about whether the assets have already been transferred. He used a metaphor about the straw

breaking the camel's back. I'm going to use a different ungulate. He's provided no reason to believe the horse is not already out of the barn or that the horse is going to imminently flee the barn.

So I fully appreciate that Daugherty says that this is what happened to him in Texas, and I've indicated before that I agree with Vice Chancellor Glasscock's sentiment that what happened here fails more than the smell test. But that doesn't mean that there is a sufficient imminent threat that it's going to happen here with Highland.

I also distinguish this case from Vice Chancellor Glasscock's entry of a status quo order in the *Trussway* matter, which admittedly was, in part, based on Highland's "prior history." In that ruling, Vice Chancellor Glasscock noted the unique appraisal remedy that was at issue there, and distinguished that property right -- which is meant to substitute for a stockholder's ability to insist on unanimity in a merger -- from recovery in a tort or contract case. Daugherty is seeking the more common sort of recovery here, so I do not find *Trussway* instructive.

So, in sum, because Daugherty's motion for a status quo order is based on a recent

development that does not support a conclusion that Daugherty faces imminent irreparable harm, the motion for a status quo order is denied.

Mr. Christensen, do you have any questions about that?

MR. CHRISTENSEN: No, I do not.

THE COURT: Okay. Anything from DLA?

MR. KATZ: No, Your Honor.

THE COURT: Thank you.

Moving on to the motion to dismiss. Highland's motion to dismiss Count IX of the amended complaint is denied. Count IX is a claim for a promissory estoppel. And to state a claim for promissory estoppel, a plaintiff must plead four elements.

The first is that a promise was made. The second is that it was the reasonable expectation of the promisor to induce action or forbearance on the part of the promisee. The third is the promisee reasonably relied on the promise and took action to his detriment. The fourth is that the promise is binding because injustice can be avoided only by enforcement of the promise. That's all from the *Chrysler* case out of the Supreme Court in 2003.

On Highland's motion to dismiss, I applied a reasonable conceivability standard of Rule 12(b)(6). Under that standard, I must accept all well-pleaded factual allegations as true, accept even vague allegations in the complaint as well-pleaded if they provide the defendant notice, draw all reasonable inferences in favor of the plaintiff, and deny the motion unless the plaintiff could not recover under any reasonably conceivable set of circumstances susceptible of proof. That familiar standard is from *Century Mortgage Company v. Morgan Stanley.*

Applying this standard, plaintiff has adequately pled the four elements. First, Highland made promises through representations it and its agents made in the Texas action. Highland, through testimony, explained that Daugherty would receive the escrowed assets upon a judgment being finalized.

Daugherty cites testimony from James Dondero, Highland's cofounder and president. On direct examination, Dondero was asked what would happen to Daugherty's interest that was being held in escrow, and Dondero stated that it would go to Daugherty via HERA if he won. This testimony is cited in paragraphs 43 and 129 of the complaint.

Highland tries to distance itself from Dondero, but it cannot do so at this stage. Highland says Dondero was testifying in a personal capacity. But the witness list Highland filed in the Texas action shows that is not the case. That is Exhibit A to Daugherty's answering brief. Highland had no response to this in its reply brief, beyond reiterating its original argument that Dondero was not speaking on Highland's behalf.

Based on the allegations of the complaint, including Dondero's role, it is reasonably conceivable he was speaking on behalf of Highland.

Other support for the alleged promise comes from an affidavit attached as Exhibit I to the complaint from David Klos. Klos submitted the affidavit and stated he had "... personal knowledge of the facts stated in this affidavit as the Senior Manager of Finance for Highland Capital ..." and because he oversaw accounting relating to HERA. Klos reiterated in his affidavit what the escrow agreement says, and Dondero testified to, which is that after a final nonappealable judgment, A&B, as the escrow agent, would transfer the deposit assets to HERA.

Highland also tries to distance itself

from Klos. And it cannot do so, as the document presented to the Texas court states Klos was providing the affidavit in his capacity as Highland's Senior Manager of Finance. At this stage, that is sufficient.

Together, these allegations are sufficient to establish that Highland made a promise that the assets would be held in escrow and released to Daugherty, via HERA, if Daugherty won in Texas.

Second, the reasonable expectation of Highland as the promisor was to induce action or forbearance on the part of Daugherty as promisee.

In briefing, Highland says the statements were not directed to Daugherty, "... but rather [to] the jury, the judge, legal counsel, the public, and so forth." That's a quote from page 20 of Highland's reply. It simply makes no sense to say that the statements were directed to everyone else involved in the legal proceeding -- indeed, in the world by virtue of including "the public" -- but not Daugherty, who had the greatest interest in that proceeding. It is reasonably conceivable the reasonable expectation of someone discussing the escrow agreement, as Highland did, would have been to

induce action or forbearance by their adversary in the litigation.

Third, it is reasonably conceivable that Daugherty reasonably relied on the promise and took action to his detriment.

Daugherty could have pursued other strategies if the escrow was not in place. Daugherty paid a judgment in the same case to Highland, which he alleges was in the amount of $3.2 million. If Daugherty knew what would happen with the escrow, he could have fought tooth and nail for an offset of the judgment amounts.

Highland focuses on the availability of a triangular offset in this situation, asserting that even if HERA owed Daugherty money, Daugherty was legally unable to offset the judgment he owed Highland by what he was owed from HERA. I think that misses the point, which is that Daugherty forewent even trying to obtain the offset, and bringing the issue to the attention of the Texas court.

He could have argued for other provisions in the final judgment, but he didn't. He paid his judgment and expected HERA and Highland would do the same as set forth in the escrow agreement.

Other members of this court have adopted a "no-chumps policy," meaning that good guys should not feel like chumps for following the rules. Daugherty played the game straight, and alleges Highland and HERA didn't. It is at least reasonably conceivable that Daugherty pursued the strategy he did because of the promises Highland made during the course of the litigation.

And that reliance was reasonable. Highland says Daugherty should have expected the worst because the language of the escrow agreement allowed the escrow agent to resign at any time, and so it was never a sure thing that the assets would be available to Daugherty.

In its reply, Highland says there was never any promise "... that the Escrow Agreement would never be terminated or that the Deposit Assets would never be transferred back to Highland ...." That reflects a dim view of the world, the way adversaries should evaluate the representations and promises made during litigation, and how the people making those promises should conduct themselves. Daugherty has adequately pled it was reasonable for him to rely on the statements he's identified.

Fourth and finally, it is reasonably conceivable that the promise is binding because injustice can be avoided only by enforcement of the promise.

Daugherty has made the point that Highland walked away from the Texas litigation with the benefit of both judgments. It received the assets supposedly held in escrow to satisfy the judgment for Daugherty, and it received payment from Daugherty to satisfy the judgment against him.

Black's Law Dictionary defines "injustice" as "an unjust state of affairs; unfairness." As myself and Vice Chancellor Glasscock have indicated, Daugherty's allegations raise serious concerns over the fairness of how things played out in Texas. It may be that the only way to avoid injustice is to enforce the promises.

It is not fatal to Daugherty that he has pled alternative theories of relief. Our Rule 8 allows it, and our Supreme Court has blessed doing so for promissory estoppel in the *Chrysler v. Chaplake Holdings* case. At the pleadings stage, those alternative theories of relief can go forward.

Highland also claims promissory

estoppel is not needed to prevent injustice because the alleged promises are incorporated within the escrow agreement, an enforceable contract. But Daugherty is not a party or a third-party beneficiary, and so cannot sue under the contract's terms. For those reasons, the motion to dismiss is denied.

Mr. Katz, any questions?

MR. KATZ: No, Your Honor.

THE COURT: Anything from you, Mr. Uebler?

MR. UEBLER: No, Your Honor.

THE COURT: I'd like to, then, talk about how we're going to get the summary judgment briefing done in time for trial and in time for me to have a minute to think about it.

MR. KATZ: Your Honor, we conferred -- my colleague conferred with Mr. Uebler this morning. I think we've worked out a schedule.

THE COURT: How long does that schedule leave me to think about it?

MR. UEBLER: Let me take a stab at this, Your Honor, and see if it makes any sense to you. So it's my understanding that the defendants are going to cross-move, or Highland -- it's a claim

against Highland. Highland will cross-move for summary judgment, and we will receive an answering brief/opening brief by June 14th. We'll reply by June 28th. And then looks like July 17th will be the final brief.

And I'm sure I speak for all the parties when I say we have no intention of imposing a burden on the Court to resolve that motion prior to trial. I think -- at least my view, and Mr. Katz and Mr. Reed can chime in -- we don't necessarily need to resolve the summary judgment/indemnification claim before trial because there's really not that much, if any, issue of fact to try regarding indemnification.

I would propose that we resolve on the papers, when the Court's able to do so, the issue of entitlement. And then, to the extent there's an issue of allocation or reasonableness, we can get together and propose something similar to Vice Chancellor Laster's *Fitracks* opinion. That was an advancement case, but I would envision something similar here.

So we're working in parallel and not burdening anybody prior to trial on those issues.

THE COURT: Anything to add?

MR. KATZ: No, Your Honor.

THE COURT: All right. That works for me, then, especially with the logical conclusion that this can just kind of float in parallel to the real merits issues to be handled at trial.

Anything else that we need to discuss today while we're all together?

MR. KATZ: Not from our side.

THE COURT: We pretty much handled every aspect of the case today. Thank you, all, for your presentations, they were helpful. And we'll be in touch.

We're adjourned.

(Court adjourned at 4:33 p.m.)

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CERTIFICATE

I, KAREN L. SIEDLECKI, Official Court Reporter for the Court of Chancery of the State of Delaware, Registered Merit Reporter, and Certified Realtime Reporter, do hereby certify that the foregoing pages numbered 3 through 96 contain a true and correct transcription of the proceedings as stenographically reported by me at the hearing in the above cause before the Vice Chancellor of the State of Delaware, on the date therein indicated, except for the rulings at pages 3 through 19 and 84 through 94 which were revised by the Vice Chancellor.

IN WITNESS WHEREOF I have hereunto set my hand at Wilmington, this 22nd day of May, 2019.

/s/Karen L. Siedlecki

Karen L. Siedlecki
Official Court Reporter
Registered Merit Reporter
Certified Realtime Reporter